FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 5 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 27

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

CODY FOWLER,
FOWLER & WHITE,
Tampa, Florida,

R. W. SHACKLEFORD,
SHACKLEFORD, FARRIOR & SHANNON,
Tampa, Florida,
Attorneys for Petitioner.

Of Counsel:

THURMAN ARNOLD,
ARNOLD & WIPRUD,
821 15th Street, N. W.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Table of Contents.

	Page
Summary Statement of the Matter Involved	1
Basis of Jurisdiction	5
Questions	6
Reasons Relied Upon for Allowance of the Writ	8
Brief in Support of Petition for Writ of Certiorari	15
Conclusion	33
Appendix	34

Table of Cases.

American Can Co. v. *Ladoga Canning Co.*, 44 F. (2d) 763, (C. C. A. 7th)	29
Bement & Sons v. *Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747	11, 17
Blacksmith's Case, 74 Eng. Rep. 643	19
Continental Wallpaper Co. v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280	11, 17
Corn Products Refining Co. v. *Federal Trade Comm.*, — U. S. —, No. 680 (Apr. 23, 1945), 65 Sup. Ct. 961	29
Dyer's Case, Y. B. 2 Hen. V, f. 5, pl. 26	19
Erie Railroad v. *Tomkins*, 304 U. S. 64, 58 Sup. Ct. 817	11
Federal Trade Comm. v. *A. E. Staley Mfg. Co.*, — U. S. —, No. 559 (Apr. 23, 1945), 65 Sup. Ct. 971	29
Hansen Packing Co. v. *Armour & Co.*, 16 F. Supp. 784 (S. D. N. Y.)	29
Meat Market Case, Y. B. Hen. VI, f. 19, pl. 13; f. 25, pl. 2	19

Page

Mercoid Corporation v. *Mid-Continent Investment Co.*, 320 U. S. 661 20

Mercoid Corporation v. *Minneapolis-Honeywell*, 320 U. S. 680 20

Oliver Bros., Inc. v. *Federal Trade Comm.*, 102 F. (2d) 763 (C. C. A. 4th) 29

Pratt v. *Paris Coke, Light & Coal Co.*, 168 U. S. 255, 18 Sup. Ct. 62 ..... 11, 17

Schoolmaster's Case, Y. B. Hen. IV, f. 47, pl. 21 19

Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172 ..... 11, 17

Swift & Co. v. *Wallace*, 105 F. (2d) 848, (C. C. A. 7th) .. 29

ADMINISTRATIVE DECISIONS.

American Optical Company, Docket No. 3232 28

H. C. Brill Co., Inc., Docket No. 3299 28

Master Lock Company, Docket No. 3386 28

Simmons Company, Docket No. 3840 28

STATUTES.

The Robinson-Patman Act, Sec. 13 (a) and 13a 15

IN THE

Supreme Court of the United States

OCTOBER TERM 1945.

No. ——

BRUCE'S JUICES, INC., a Corporation, *Petitioner,*

v.

AMERICAN CAN COMPANY, a Corporation.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Bruce's Juices, Inc., respectfully prays for a writ of certiorari to the Supreme Court of the State of Florida to review the decision and judgment of the said Court in the above entitled case dated April 17, 1945.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Bruce's Juices, Inc., is an independent processor of fruit juices operating a plant in Tampa, Florida. It sells

its products in a number of states which can be economically supplied from that base. It buys containers which it uses from American Can Company. Its annual purchases from that company amount to about $350,000.00. (R. 110).

The American Can Company is the world's largest manufacturer of cans. Under a central management it operates plants and warehouses in twenty-five states (including a plant at Tampa) in order most effectively to meet competition in each area. (R. 220). Its costs in these several plants, dependent as they must be upon varying circumstances of production, are different. American Can Company supplies the containers used by the larger competitors of your petitioner which sell not only in petitioner's market, but on a nation wide scale. Among them are California Packing Corporation (Del Monte brand); Stokely Brothers and Company (The Van Camp brand); Hawaiian Pineapple Company; Libby, McNeil & Libby; and the Great Atlantic and Pacific Tea Company. (R. 111-112). These large competitors, purchasing from the same company as your petitioner, are supplied, not from a single plant, but from plants located all over the country. Their aggregate annual purchases, scattered among many plants, amount to many millions of dollars each. California Packing Corporation alone buys more than $7,000,000 in cans each year from American Can Company. (R. 201).

The contracts under which American Can Company supplies cans both to your petitioner and to its larger competitors are practically identical. (R. 106-108). The quoted price is subject to a sliding scale of discounts based upon total annual purchases, irrespective of whether the orders are filled from one or many plants. These discounts run from 5% if the annual purchase is over $7,000,000.00 down to 1% on a $500,000.00 annual purchase. No discounts are allowed for quantities under $500,000.00. (R. 129). The practice of basing discounts upon such aggregate purchases instead of upon orders filled from a single plant does not

correctly reveal differences in costs. Its effect, however, is seriously to handicap an independent company selling in competition with a corporation which operates a number of widely scattered plants. Thus your petitioner buys from the plant of American Can Company in Tampa, Florida, a quantity fully equal to amounts delivered from the same plant to the local establishments of Stokely Brothers and to the California Packing Corporation. (R. 75). Yet your petitioner receives no discount on its purchase, while California Packing Corporation receives a 5% discount on orders of the same size. In only one year was it, by reaching a volume of $500,000.00, able to obtain a discount—1%. It is clear that under this system the product of a canner whose purchases from a local plant are equal to, or even greater than those of his larger competitor, cannot compete with a nation wide brand on equal terms.

Canning is a business of great volume and small profit. The cost of cans often runs as high as 50% of the factory cost of the product. Thus the system of discounts established in the contracts involved in this case tends to impair, or even to destroy, independent local competition in every area. It is a direct invitation, indeed a compulsion, toward the merger of independent local canners into one or more combinations or their absorption by corporations which sell on a nation wide scale. For example, if the California Packing Corporation should acquire Bruce's Juices, the petitioner, through the very fact of operating as a part of a larger corporate imperium, would immediately be entitled to the 5% discount which is now beyond its reach.

The case at bar arose out of the competitive hardship imposed by the system of discounts outlined above. Ever since the passage of the Robinson-Patman Act your petitioner has had a continuing account with American Can Company under which from 1937 to 1942 only it has paid more than $2,000,000.00 for cans. (R. 110). Prior to the institution of this suit it owed a balance on this account of about $114,000.00 which was substantially repre-

sented by promissory notes. Your petitioner had repeatedly protested against the system of price discrimination and against other special favors to its larger competitors. As antecedent to a settlement of its account, it asked for an adjustment on the basis of the equality of treatment demanded by federal law; but no relief was given. Instead American Can Company brought the present suits on the promissory notes. It thus sought to enlist the aid of the Florida Courts in policing its system of discriminatory prices and competitive handicaps.

The sole defense to this action finally relied on by petitioner was that the renewal notes sued on were illegal and unenforceable because the transaction in which they were executed was unlawful as in violation of the Robinson-Patman Act. In respect to the defense interposed, no issue of fact was ever tried.

Proceedings in the lower court were limited to a pre-trial conference instituted by the court on its own motion. (R. 57). Its sole purpose was to ascertain whether amendments should be made to the pleadings and to narrow and clarify the issues in controversy. To this end testimony was heard and depositions were taken. It was not, and it was never intended to be, a trial of issues of fact. The record here, voluminous as it is, is to be considered in the light of the function it was intended to serve. The taking of testimony, both upon the discriminations of American Can Company, including its price policies, and upon its alleged justification, was never completed. In respect to these issues the plaintiff refused to answer questions, and its refusals were never ruled on by the court. The trial judge gave no official consideration to this incomplete body of evidence; he made no findings of fact. Before the pre-trial conference was completed he came to the conclusion that, as a matter of law, the defense that the contract violated the Robinson-Patman Act was not available in a suit in a state court. He held, in the light of that ruling, that there was no purpose in completing the testimony, (R. 581), and entered judg-

ment against petitioner in the sum of $122,789.60. (R. 584-585).

On appeal, and in a carefully considered opinion, the Supreme Court of Florida, two of the seven judges dissenting, reversed the ruling of the trial court. It held that the defense of a violation of the Robinson-Patman Act was available to your petitioner. It, therefore, remanded the case for trial of the issues raised by that defense. (R. 593-601).

After a rehearing the Supreme Court of Florida, by a vote of four to three, affirmed the judgment of the court below, ignoring its former ruling. One judge insisted that as a matter of law the defense requested was not available. Three judges out of seven, in a so-called per curiam opinion, without citation of authority or recitation of reasons, held that "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below." The three remaining judges adopted as their dissenting opinion the original opinion rendered by the court. (R. 621). Thus four judges, differing in their interpretation of the law, voted to affirm the judgment of the court below, thus leaving to the defendant no remedy save a petition to this Honorable Court.

II.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 344(b), 28 U. S. C., (Jud. Code, Sec. 237), the petitioner having been denied a right, privilege, or immunity specifically set up and claimed under a federal statute, to wit: Section 13 and 13a of the Robinson-Patman Act, Title 15, U. S. C. A.

III.

QUESTIONS.

1. *In an action in a state court to collect promissory notes given as consideration for purchases in interstate commerce at prices which through their discriminatory character tend substantially to lessen competition, may the defendant plead that such notes are unenforceable because the transactions on which they are based violate the Robinson-Patman Act?*

This question does not require the Court to decide that the entire transaction is so tainted with illegality that the seller cannot collect even the fair value of the goods, thus giving the buyer a windfall. The question can, of course, be answered on that broad ground; and the petitioner intends to argue that a transaction unlawful under the Robinson-Patman Act constitutes criminal conduct which a court can not be called upon to police and upon which no money judgment can be based.

But, if it be admitted that the buyer is entitled to the fair value of the goods, petitioner's defense can be sustained on a narrower ground. It is that narrow ground which is actually presented by the record. There is here, on the part of the plaintiff, no mere demand for the fair value of its merchandise. Instead the record of the unfinished pre-trial conference suggests the strong probability that petitioner has already paid the fair value based on prices at which American Can Company sells to its larger competitors. This is, in fact, not a suit for debt lawfully due. It is rather an action to enforce a system of prices and trade practices which, through its departures from equality of treatment, has prevented and still prevents petitioner from competing on equal terms with its more favored competitors. If, in separate actions brought against individual purchasers, state courts can enforce the collection of discriminatory prices, they can defeat the entire purpose of the Robinson-Patman Act. By denying such a defense as is sought here,

they can make secure a widespread system of mercantile discrimination. Thus, by their very judgments, state courts can put a sanction on transactions forbidden by federal law.

By obtaining a judgment in this case the American Can Company has secured the aid of a state court in effectuating the objective which the Act specifically condemns. Thus the state court has become an active instrument in injuring, lessening and preventing the market competition which it is the very intent of the antitrust acts to keep alive.

2. Are the pleas—as clarified and supported by the unfinished pre-trial conference—sufficient to require the lower court to submit the issues of price discrimination to trial on their merits?

The record represents the proceedings of an unfinished pre-trial conference. It is put forward to show that the plea of violation of the Robinson-Patman Act which petitioner sought to interpose in the action brought against it is substantial and not frivolous. It is introduced for the sole purpose of demonstrating that the defense sought raises a series of important federal questions upon which petitioner is entitled to a trial at law.

The larger question breaks into two separate questions:

(1) Were the allegations by petitioner of discriminatory practices in violation of the Robinson-Patman Act sufficient to require their submission to trial by law?

These allegations, supplemented by the pre-trial conference, disclosed the following illegal practices:

(a) Contracts between the American Can Company and the competing customers to whom it sells at prices highly discriminatory on their face in violation of the Robinson-Patman Act.

(b) Departures from the quoted prices, e. g., sale of cans in Texas at prices lower than those made to petitioner, in violation of that statute.

(c) Favors and special services, such as equipment for closing cans and "freight equalization", withheld from peti-

tioner without extra payment and rendered without cost to its larger competitors, in violation of that Act.

(d) Quantity discounts, granted on the aggregate volume of annual sales, irrespective of whether orders are filled from one plant or many, unjustified by the exception set down in that statute.

(2) Did petitioner, at the pre-trial conference, make such admissions as to forfeit its right to have the issues submitted to a trial at law?

3. Is a right established by federal law to be abridged or denied by serious departures from the ordinary requirements of proper process in a state court?

Petitioner grants that, within the most tolerant limits, the highest court of a state is free to shape its own judicial procedure and to review the judgments of its lower courts in its own way. Nor does it question the right of the Florida Supreme Court, in a cause which involves only state law, to employ a summary judgment for which the state statutes make no provision. It does, however, insist that under our system of government, the right of the litigant to a defense grounded in federal law is not to be denied or abridged by a procedure which departs as radically from the minimum requirements of proper process as that recited in the pages which follow.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. It is of national importance that, to the question of the right to plead a violation of the Robinson-Patman Act in a suit in a state court, an authoritative answer be given.

The answer to this question is of importance in its effects upon litigation, the conduct of business, the pattern of the economy, the general welfare. It appears, as is set forth

below,[1] that the Robinson-Patman Act is a spelling out in some detail of the prohibition against restraint of trade. It seems to follow that a defense, which according to the decisions of this Court, is available when the offense is against the common law or the Sherman Act is also available when the offense is against the Robinson-Patman Act. If it is, the final decision of the Florida Supreme Court is not in accord with the law,[2] and justice to petitioner demands that it be corrected. If it is not, the distinction between the Robinson-Patman Act and the other parts of the antitrust code should be clearly and authoritatively set forth. The issue presented here may emerge in a case in any state in the Union; and the administration of justice demands that state courts the country over should be able to rule correctly upon the availability of the defense sought here.

The importance of this question transcends the interest of petitioner. If the victim of a flagrant violation of the Robinson-Patman Act, denied the opportunity to enter such a defense when sued, must in another action go into the federal courts for help, the practical effect is to defeat to a large degree the purpose of the Robinson-Patman Act. The economic consequences of this result are serious. For then the only remedy which lies within the means, as well as the legal reach, of the small concern—that of a defense in his local court—is lost. There is taken away the defense of a plea of restraint which since time immemorial has been among the ancient rights of the litigant. The results are of general concern; they should not—they cannot—be measured in terms of injustice done in the individual case.

To approve—and thus to convert into the law of the land—the judgment of the Florida Supreme Court is to enthrone a nationwide system of discriminatory trade practices. The mantle of protection which the Congress zealously has thrown about the small manufacturer and the

[1] See pp. 18-21 below.

[2] See citation in Footnote 4.

small merchant will have been torn away by the judiciary.

It is for this Court categorically to say whether the purpose of the Congress in outlawing discriminatory practices is to be compromised or even thwarted by a judicial denial of age-old pleas which are instruments of its realization. For the right to plead restraint of trade as a defense is the one weapon with which the small business concern may protect itself.

2. The Florida Supreme Court has decided a federal question of substantial importance contrary to the decisions of this Court.

The record makes it clear that the outcome of this litigation turned upon the answer given to a federal question in the courts of Florida. The Circuit Court of Hillsborough County, Florida, held that the defense of violation of the Robinson-Patman Act was not available in an action in a state court. By such a ruling it cleared the way for a judgment in favor of the plaintiff in respect to the three promissory notes. On appeal the Supreme Court of Florida, reversing the lower court, held that such a defense was available and that the defendant was entitled to an opportunity to make out his case. Although they arrived at opposite results, the two opinions were alike bottomed upon the decisions of this Court. And whatever be the rationale of the Supreme Court of Florida in its second judgment—whether it held as a matter of law that the defense asked for was not allowable or whether it held that on the evidence taken at the pre-trial conference the trade practices in question did not violate the law—it concerned itself with a federal right, entertained a federal question, and entered a judgment in a realm where the decisions of this Court are authority.

Yet it requires little argument that the defense put forward by petitioner would have been available in a cause of

action in a federal forum. The right to such a plea is definitely settled by the decisions of this Court.[3]

3. *The sound administration of justice demands of a state court, when called upon to interpret and apply a federal statute, a construction at harmony with that given to it in the federal courts.*

Here a situation is presented which is the converse of that resolved in *Erie Railroad v. Tomkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). That case decided that, when called upon to interpret and apply state law, the federal court should follow the decisions of the highest court of the state in question. In the trial of the present cause, the petitioner put forward as a defense a privilege and an immunity conferred upon it by a federal statute. The rationale of the *Erie* case would seem to demand a disposition of the proposed plea by the Supreme Court of Florida in harmony with that which would be accorded it in the federal courts.

In the situation presented here the need for uniformity stands out the more sharply. The criticism of the *Erie* decision has been that, if the federal court follows the courts of the several states, it will be at the expense of a chance at uniformity the country over. Here it is a nationwide uniformity in the interpretation of a federal law which the rationale of the *Erie* case will serve. Thus the logic of that holding unites with criticism of it to demand that the state court follow the federal decisions. The rule of harmony sought here can come only from the United States Supreme Court.

---

[3] *Belcnap & Sons* v. *Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Continental Wallpaper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; *Prati* v. *Davis Coke, Light and Coal Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165.

4. The holding of the Florida Supreme Court, if allowed to stand, would impair the enforcement of the Robinson-Patman Act; seriously weaken the competitive position of small business; and promote a concentration of economic wealth and power in contravention of public policy as manifest in the antitrust laws.

A denial of the defense asked for involves the most serious consequences.

(1) The loss of a remedy, perhaps the most effective remedy, will rob the Robinson-Patman Act of much of its power of prevention. The victims of price discrimination will be denied the opportunity to defend themselves when in ordinary suits at law the transactions out of which such unlawful conduct emerges are already in court and the defense is most easy and certain. The vigilance of the wronged in the defense of their own right, upon which, among other sanctions, the enforcement of the antitrust laws has been rested, will be lost. And, since administrative action is uncertain and the triple damage suit too expensive for everyday use, the risks which attend violation will be materially reduced.

(2) As a consequence all small business will be put in jeopardy. The seller, who maintains a multiple price structure, will institute his suits in state courts, where the buyer can not fight back by pleading the discriminatory practices to which he has been subjected. The victim, however great the handicap imposed on him, can assert his rights only by instituting a new suit for triple damages in a federal court or by waiting for the federal government to come to his rescue. The triple damage suit is likely to prove protracted and expensive; damages caused by a disadvantageous competitive position are so speculative as to be usually unprovable. Nor can the buyer rely for protection upon the action of the government. The Department of Justice or the Federal Trade Commission may never get around to the matter; the suit in equity or the cease and desist order operates in respect to the future and does not afford him a

remedy for wrongs endured in the past. And, so long as he lacks his own remedy, lower prices, quantity discounts, special services, benefits of one sort or another denied to him would be available to his stronger competitor. At best, the small merchant can compete only under serious handicaps; at worst he is forced into bankruptcy.

(3) The ruling encourages the trend towards the concentration of economic wealth and power. The Congress has singled out price discrimination as among the most dangerous restraints of trade. The corporation which is in a position to maintain a multiple price structure has the power, among the competing concerns to which it sells; to favor the big as against the little; to widen for the one and to narrow for the other the margin between cost and price; to decree survival or failure among business rivals. To permit the seller to exercise such an irresponsible power to shape the pattern of the national economy is contrary to Congressional intent and public policy.

(4) If this ruling is allowed to stand, a curious result will follow. Instead of the violator revising his system of trade practices to accord with the law, the injured party must adjust its affairs to trade practices which violate it. The victim will be compelled to seek an escape from the squeeze between cost and price which the seller, from which it must purchase, has the power to impose. It may, to secure the lower prices and the special favors essential to survival, become a subsidiary of its larger competitor. Or, more likely, a number of smaller concerns may be forced to form a combination in order to secure treatment equivalent to that accorded "the most favored customer." In either event the move will be towards the result which it is the very purpose of the Robinson-Patman Act to forestall.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. ——

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1. In an action in a state court to collect promissory notes given as consideration for purchases in interstate commerce at prices which through their discriminatory character tend substantially to lessen competition, may the defendant plead that such notes are unenforceable because the transactions on which they are based violate the Robinson-Patman Act?

1. The notes are unenforceable because the transactions on which they are based violate the Robinson-Patman Act.

The statute invoked here, Par. (a), Sec. 13, Title 15, U. S. C. A., makes it unlawful for any person directly or indirectly to discriminate in price between different pur-

chasers of commodities of like grade and quality, etc. The only exception, as set forth therein, is as follows:

> "*Provided*, That nothing contained * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

Section 13a makes discrimination between customers by means of discounts or otherwise a crime penalized by fine or imprisonment.

The petitioner, in defense of the action, set up by its pleas that the notes upon which recovery was sought were illegal and unenforceable for the reasons that:

(a) The notes were given in the course of a series of transactions for the purchase of cans; and the transactions were unlawful and the notes unenforceable, because the plaintiff, through its system of prices and otherwise, discriminated among its purchasers, and to the detriment of your petitioner, in violation of paragraph (a) Section 13, Title 15, U. S. C. A. (The Robinson-Patman Act);

(b) The plaintiff discriminated in favor of certain competitors, and to the detriment of petitioner, by furnishing to them equipment for closing cans and other special services and favors, all of which were denied to or charged against petitioner in violation of paragraph (e), Section 13 of the Robinson-Patman Act;

(c) The plaintiff discriminated against petitioner by allowing discounts to purchasers over and above any discounts allowed to defendant, likewise in violation of the federal statute; and

(d) The plaintiff sold cans in Texas for less than in Florida in violation of Section 13a of the Robinson-Patman Act;

the effect of all of which discriminatory prices and trade practices was substantially to lessen competition.

The judge of the Circuit Court for Hillsborough County, Florida, ordered a pre-trial conference for the purpose of exploring the issues. After a great deal of testimony was taken, but before the inquiry was concluded, he invoked the decisions of the United States Supreme Court; insisted that, under these decisions "the contract of sale was not malum per se but malum prohibita"; ruled that the Robinson-Patman Act itself "prescribes the only remedies available to persons affected by its violation"; and held that the defense sought was unavailable. (R. 580). So in a separate opinion, disregarding all evidence relating to the mercantile practices of American Can Company, he entered a so-called summary judgment against petitioner.

This judgment, which narrowed the matter at issue to the question of the validity of the notes, was appealed. The Florida Supreme Court, in a carefully reasoned opinion, categorically held that the pleas presented a legal defense. It therefore reversed the judgment in order "that the issues raised by the pleas as they now stand, or are eventually settled, may be tried." (R. 894). This determination of the issue was directly predicated upon the following decisions of this Court, cited and discussed in its opinion: *Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; *Pratt* v. *Paris Gaslight & Coke & Coal Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165. Of the seven members of the Court, all of whom participated, only two dissented. One of these stated

> "I dissent because I think the sales contract which constituted a part of the plea was free of discrimination and therefore the pleas were of no avail."

Upon rehearing, the Supreme Court of Florida, without affirming or reversing its holding on the federal issue of the availability of the defense sought, voted four to three to

affirm the judgment of the court below. Of the four voting to affirm, one judge was of opinion that as a matter of law the defense sought was not available. Three judges were of opinion that "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below." The three dissenting judges adhered to the former opinion and judgment of the court. Thus, whether the reason was that the defense of a violation of the Robinson-Patman Act was not pleadable in a state court, or whether assuming its availability, petitioner was not under the undisputed facts revealed by the evidence taken entitled to raise it, the Florida Supreme Court passed upon a federal question and disposed of a federal right.

The refusal of the Florida Supreme Court to permit petitioner to interpose the violation of the Robinson-Patman Act as a defense, under the circumstances alleged in the pleas, clearly denied to him a privilege and immunity under the federal statute. The ultimate judgment is subject to challenge for these reasons:

(1) The judgment stands affirmed against petitioner in a state court when, had the identical issue been tried in a federal forum, the defense interposed would have been available and petitioner would have been accorded the right to establish it by evidence.

(2) The effect of the ultimate decision is to deny to petitioner a right which is established by common law and available under the provisions of the antitrust acts.

2. Restraint of trade as a defense may be plead in an action at law in respect to any violation of the antitrust acts.

The plea of restraint of trade as a defense in an action at law is one of the oldest and best established of the devices for enforcing the principles later enunciated in the antitrust laws. This defense dates from "time immemorial." A rule against restraints came into the law in the period marked by the break up of the guilds and as a

protest against exclusive privileges that these brotherhoods enjoyed. The common law judges, by hearkening to the defendant's plea of restraint of trade, refused to entertain suits wherein the assistance of the court was sought in creating or maintaining restraints. The defense, as the cases reveal,[4] was available through the whole range of suits brought under the ancient writs. It was particularly appropriate in an action for debt. It was, by the Statute of Monopolies, elevated above the royal prerogative and made the principal instrument by which this famous Act of Parliament was enforced.

The Sherman, the Clayton, the Robinson-Patman Acts are alike in kind, in intent, in the actions they prohibit. The Sherman Act is written in the very language of the common law. The Clayton Act is, technically, a "supplement" to the Sherman Act; the Robinson-Patman Act, an "amendment" to the Clayton Act. The Sherman Act, in terms which are comprehensive, flexible, and adaptable to the changing circumstances of life, sets down the general rule against restraints. The Clayton Act marks out for special attention certain trade practices the effects of which are substantially to lessen competition. The Robinson-Patman Act, elaborating an ancient prohibition to meet the conditions of modern merchandising, singles out price discrimination as particularly dangerous. The common objective of the antitrust laws is the maintenance of the competitive pattern in the national economy.

It is true that the Robinson-Patman Act puts additional teeth in the antitrust laws. But as the novel remedies in

[4] In *The Schoolmaster's Case*, Y. B. Hen. IV, f. 47, pl. 21 (1410), a writ of trespass was refused to two schoolmasters who complained that a third had set up a shop in competition; in the *Meat Market Case*, Y. B. Hen. VI, f. 19, pl. 13; f. 25, pl. 2 (1433), a writ of trespass on the case was refused the Prior of Dunstable against a butcher who, instead of employing my lord's market, sold meat at his own house; in the *Dyer's Case*, Y. B. 2 Hen. V, f. 5, pl. 26 (1415)—here quite in point—a writ of debt was refused John Dyer, against a rival who had bound himself by contract not to use "his art of the dyer's craft." Directly in point is the *Blacksmith's Case*, 3 Leon. 217, 74 Eng. Rep. 643 (1587), where the writ of assumpsit was held not available to one who sought to hold another party to a restrictive covenant.

corporated in the Sherman Act did not abrogate the defenses theretofore existing under the common law, likewise the provision of further remedies by the Robinson-Patman Act did not destroy those already existing. If the Congress had intended to take from the injured party an ancient remedy, the Congress would doubtless have said so.[5]

The elaboration of antitrust law has been constantly attended by an increase in the number of available remedies. To the defense upon which the common law relied, the Sherman Act lifted from the Statute of Monopolies and conferred upon the injured party the right to sue for triple damages. It also, enlisting the government as an agency of police, empowered it in the enforcement of the statute to employ the action for crime, the suit in equity, and the libel against the ware. To this list was added, by the Clayton Act, the cease and desist order as an administrative remedy. And the Robinson-Patman Act, in a number of provisions, made easier the way of proof and correction. The whole history of antitrust legislation reveals a clear intent by the Congress always to strengthen, never to weaken, the prohibition against restraint; to throw additional defenses around the competitive system, not to strip from small business the self-defense, when sued in court, which has been its right from time immemorial.[6]

[5] In fact in the Clayton Act itself—see section 16—the Congress did take from the shipper the right to an action at law in respect to an "unfair" railroad rate and did, specifically, limit legal challenge to the United States Government. In its stead the shipper was given the right of complaint to the Interstate Commerce Commission. The reason for the Congressional denial of the private cause of action was that resort to the courts by every individual who felt aggrieved carried a serious hazard to the administrative process. In this instance exceptional reasons demanded a departure from established practice; and the abridgement of an ancient right was made explicit by the legislature itself. The very writing into the statute of the exception is an acknowledgement that in other cases it stands.

[6] A decision of this Court has allowed the defense of restraint of trade to be interposed in a suit for an infringement of a patent. In that case the conduct prompting the initial legal action, belonging rather to tort than to contract, did not emerge in the course of a transaction between the parties. *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Mercoid Corporation* v. *Minneapolis-Honeywell*, 320 U. S. 680.

The history of antitrust shows the Robinson-Patman Act to be an integral part thereof.[7] All through the years the Congress has been sensitive to the effects of the concentration of economic wealth and power; all through the years the Congress has been solicitous lest conditions of survival be made intolerable for "the little fellow." Nothing along the way indicates an intent on its part to regard any of the new remedies it has created as a substitute for the right of a person to plead restraint of trade as a defense. To argue that its acts have closed to the victim of monopolistic practice the one practical and immediate avenue of redress—the right to a defense in his own local court when sued—is to pervert the intent of Congress.

It is submitted that justice in the instant case and important considerations of public policy require the question of the availability of the defense, grounded in the Robinson-Patman Act, to be finally and authoritatively settled.

3. If the defense sought is denied, the petitioner is left without an immediate and practical remedy.

In the absence of the defense sought, the small merchant or manufacturer is left without an immediate and practical remedy. The only direct move which he can make is to institute a new suit for triple damages in a federal court. The only other recourse is to file a complaint with the Department of Justice or the Federal Trade Commission. In due course there may—or may not—emerge a criminal action, a suit in equity, or a cease and desist order, seeking to end the abuses from which he suffers. A word about each of these alternative remedies is enough to show its inadequacy as an instrument of personal justice.

[7] In the petions in the courts below American Can Company insisted that the defense sought was not available under the Robinson-Patman Act. There it granted, at least obliquely, that the defense was allowable at common law and admitted the possibility of its being available under the Sherman Act. But it urged that differences between the Sherman and the Robinson-Patman Acts put the defense outside the reach of petitioner. It cannot be determined from the ultimate judgment whether this distinction was accepted or rejected by the court below.

A. *The Suit for Triple Damages.*—At the time of the passage of the Sherman Act, the general belief was that the antitrust laws should be as nearly self-enforcing as possible. But the general reliance then put upon the suit for triple damages has not been vindicated by experience. Even if restraint can be shown, the hazard of a proof of damages remains to be met. The conditions which impel a business enterprise towards growth or decay are many and various; to determine the exact place of the restraint in question among these, and to reduce to pecuniary terms the harm of which it is the cause, imposes on a court an almost impossible task. There is, in fact, little chance for a small business concern to win such a suit against a large corporation, unless the federal government has blazed the way with an action of its own.

B. *The Criminal Action.*—Nor is a criminal action, instituted by the federal government, a remedy upon which a party in the situation of your petitioner can rely. The small concern can file a complaint with the Department of Justice. It has access to no process by which to compel the government to move; and, for any one of a number of reasons, the government may delay action or may never get around to the case. But, if it acts promptly and vigorously, the Department of Justice can not secure to the small business the relief it seeks. It is only as a deterrent that the criminal action is effective; and that does not operate to undo harm done in the past. Even as a future deterrent its efficacy is seriously impaired. For the profits which result from modern forms of restaint, such as price discrimination, are so huge and the penalties for violation of the antitrust laws so small that corporations such as the American Can Company are constantly impelled to take chances.

C. *The Suit in Equity.*—The government's suit in equity is not shaped to the needs of the party in the situation of petitioner. The complaint of the injured person does not institute it; it does no more than inform the Department of Justice. At best the suit, if won, can do no more than en-

join the continuation of illegal practices; it can not be made to reimburse the party wronged for the excess in price already exacted and for the weakening of competitive position which unlawful charges have imposed.

D. *The Cease and Desist Order.*—Almost the same statement is to be made about the cease and desist order. It is not a writ, to which as a matter of right, a party injured by unlawful discrimination has a right. The process leading to its grant is instituted by the Federal Trade Commission; the injured person can do no more than file a complaint. Like the decree in equity, it is preventive of future wrongdoing rather than compensatory of harm already suffered. Its prohibitions may often be circumvented by ingenious revision of the trade practices outlawed. However stern its language, its mandate is in practice no stronger than the system of police with which it is followed up.

There is, therefore, available to the victim of a system of price discrimination only one effective remedy—the defense put forward in this case. If that remedy is held to be within his reach, he is in a position to fight his own legal battle. He may refuse to pay for the goods so long as the price made to him remains unlawful. If the small merchant is not permitted legally to fight back when he is called upon to pay an excess in price over that charged his larger competitor, he is in effect denied the chance of business survival.

If, therefore, the holding in issue here is allowed to stand, the victim of unlawful trade practices is deprived of his one immediate and practical way of fighting back. The state court, by its denial of the remedy sought, in effect interposes its veto to the enforcement of federal law; confers a sanction upon transactions which federal law prohibits; and aids and abets conduct which federal law holds to be a crime.

II. Are the pleas—as clarified and supported by the unfinished pre-trial conference—sufficient to require the lower court to submit the issues of price discrimination to trial on their merits?

1. The allegations in the pleas are sufficient to demand that the issues raised be submitted to trial.

The question of price discrimination, as presented here, may be resolved into three closely connected issues:

(a) Was the system of prices, with its schedules of discounts, maintained by American Can Company, in violation of the Robinson-Patman Act?

(b) Did price discrimination, other than the regular "quantity discount," attend the operation of American Can Company's system?

(c) Were there, apart from price, other discriminations practiced by the American Can Company?

The quoted system of prices may itself be violative of the Act; or practices which attend purchase and sale may violate the Act by turning quoted prices into fictions.

To explore the sufficiency of the allegations, the pleas of petitioner set forth, with due circumstance and detail, the following types of unlawful discrimination:

(a) That American Can Company engaged in direct discrimination in that the prices charged petitioner were higher than those made to its larger competitors. (R. 4-5)

(b) That American Can Company furnished to certain customers equipment for the closing of cans without cost while it charged the petitioner therefor in violation of Paragraph (e) of Section 13 of the Act. (R. 5)

(c) That discounts of 5% were allowed to the California Packing Corporation and to Stokely Brothers and Company, Inc., both of which have branch plants in Tampa where petitioner's plant is located; and that to petitioner was refused the same—or any discount—on purchases in similar amounts. (R. 6)

(d) That American Can Company illegally favored a number of petitioner's larger competitors—among them the California Packing Corporation, Stokely Brothers and Company, Inc., the Hawaiian Pineapple Company, Libby, McNeil and Libby, Inc., and the Great Atlantic and Pacific Tea Company—by allowing to each of them, and denying to petitioner, discriminatory discounts of from 3% to 5% on all purchases. (R. 6-7)

(e) That from its factory at Tampa, Florida, the American Can Company delivered cans without cost to the plants of the California Packing Corporation and of Stokely Brothers and Company, Inc., while petitioner was required to pay all delivery charges. (R. 6-7)

(f) That the American Can Company sold cans in Texas at prices lower than those exacted in Florida in violation of Section 13a of said Act. (R. 7)

These pleas set forth in detail facts which, if true, show beyond question the violation of various sections of the Robinson-Patman Act. To decide otherwise would be to hold that conduct in direct violation of statute, and by Section 13a made punishable by fine and imprisonment, is lawful.

2. The testimony taken at the unfinished pre-trial conference, instituted for the sole purpose of exploring and clarifying the issues to be tried, discloses no undisputed facts or admissions by petitioner which would justify a summary judgment in the absence of trial.

In response to the defense put forward, counsel for the American Can Company sought, through a series of motions, to attach compulsory amendments to petitioner's pleas, alleging a great many additional facts. At this point the trial judge discovered that—with the initial question, the federal issue raised, and the amendments proposed to the defendant's pleas—the case was becoming unusually complicated. Accordingly, on his own motion, he ordered a pre-trial conference. Its purpose was "to simplify the

issues . . ., to determine the necessity or desirability of amending the pleadings, to obtain admissions of facts and of documents which will avoid unnecessary proof, and to limit the number of witnesses." The order further provided "that either party . . . is authorized and empowered to take necessary depositions . . ." Objections to proposed interrogations were to be ruled on by the court before any witness was required to answer. (R. 37-39).

At this pre-trial conference the facts disclosed by the evidence—so far as it was taken—failed to show any admission by petitioner which would justify a summary judgment. Instead, the evidence introduced, incomplete as it was, established a prima facie case in respect to many of the discriminations complained of. (R. 65-83; 402-505). The officials of the American Can Company admitted a lack of uniformity in respect to the equalization of freight charges between competitive points. (R. 148). They admitted that freight deductions were sometimes allowed "for other reasons which we are able to determine," (R. 149); that the profits of "equalization" and even of "special rates" were given to special customers and withheld from others; that such favors continued during the life of the contract with the particular purchaser (R. 172-173); that usually such concessions were made orally, though once in a while confirmed by letter. (R. 173). A request was made by petitioner for the production of letters revealing the favored customers; the witness was instructed by counsel not to answer; the question was certified to the trial court. (R. 172-3). It was also admitted that substantial discounts were allowed solely on the basis of aggregate quantity sales. (R. 282).

At the taking of depositions in New York, American Can Company produced the form contracts. (R. 109). In these contracts the nature of the price structure and the provisions for quantity discounts were set forth. An exposition of the whole pricing system was also given by officials of the company. (R. 209-219, 234-245, 506-507, 571-579.) By

edules, discounts running from 1% upon annual
s of $500,000.00 to 5% upon annual pur-
$7,000,000.00 or more were established. These
were to be calculated upon the aggregate
sales to the particular customer, irrespec-
he number or the location of the plants from
merchandise was shipped. A number of your
's larger competitors, operating plants in many
f the country, were receiving their supply of cans
ral of the American Can Company's factories. A
ample, put in evidence (R. 240-243), indicates the
s imposed by this system of cumulative quantity
upon the small purchaser.

pa, Florida, is located the canneries of Bruce's
nc., and of other independents. There, too, are
lants of the California Packing Corporation and
y Brothers and Company. The contracts under
these concerns are supplied are identical. Peti-
ys from the American Can Company's plant in
quantity approximately equal to the amounts sold
these larger competitors. Yet petitioner receives
nit while the California Packing Corporation re-
iscount of 5% upon orders of the same size. It is
, under such an arrangement, the product of an
ent can not compete on equal terms, even within its
ket, with the nation wide brand. When it is re-
l that the canning business is one of great volume
profit and that the cost of cans often runs as high
f the factory cost of the product, it becomes ap-
hat survival becomes almost impossible for the
ependent canner.

occasions counsel for the American Can Company
(R. 102, 367), that the burden was upon it to
uch practices as coming within the scope of the
which the law permits. Its chief counsel, Mr.
his testimony explained that the system of quan-
unts was set up when the Robinson-Patman Act

was passed; that it represented an estimate of some of the officers of the company; and that it rested neither upon cost accountancy nor upon actual experience of reduction of cost with quantity of sale. He also stated that the practice was an attempt to bring the system within the exception set down in the statute. He went so far as to admit that the policy of the company was prima facie a violation of the Robinson-Patman Act and that the burden of proof rested upon his company to justify the quantity discount as grounded in savings through quantity sales. (R. 571-578).

The system of discounts deserves a further word. Instead of adjusting discounts to savings in cost with volume of sales, it sets up a classification of customers. And customers are classified, not by the relative expense incurred in serving them, but on the sheer dollar volume of their purchases. All customers whose purchases run to less than $500,000.00 a year receive no discount; those whose purchases are between $500,000.00 and $7,000,000.00 receive from 1% to 4% discount; those whose purchases amount to or exceed $7,000,000.00 receive a 5% discount. As a result expenses are not apportioned by customer or even by plant; they are hypothecated for the class of customer. (R. 241). For example, against the small purchasers is set down an item of expense for "commissions," although it is admitted that in Florida no commissions were required to be paid. (R. 510, 576). It is hard to fashion a price system better calculated to serve the ends which it was the purpose of the Robinson-Patman Act to prevent.

It is submitted that such contracts, on their very face, violate the prohibition of the Robinson-Patman Act. Repeatedly they have been so held by the Federal Trade Commission. Simmons Company, Docket No. 3840; Master Lock Company, Docket No. 3386; H. G. Brill Co., Inc., Docket No. 3299; American Optical Company, Docket No. 3332.

When a prima facie case of discrimination is shown, the burden of proof to justify the practice rests upon the accused corporation. It must, by a showing of lower cost with

volume of sales, demonstrate that the quantity discount falls within the exception permitted by law. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th). See also *Swift & Co.* v. *Wallace*, 105 F. (2d) 848 (C. C. A. 7th); *Oliver Bros., Inc.* v. *Federal Trade Comm.*, 102 F. (2d) 763 (C. C. A. 4th); *Hansen Packing Co.* v. *Armour & Co.*, 16 F. Supp. 784 (S. D. N. Y.)

Moreover, the system of cumulative quantity discounts in issue here is a discrimination analagous to "the basing point pricing system" held unlawful alike by the Federal Trade Commission and by this Court. *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, —— U. S. ——, No. 559 (Apr. 23, 1945), 65 Sup. Ct. 971; *Corn Products Refining Co.* v. *Federal Trade Commission*, —— U. S. ——, No. 680 (Apr. 23, 1945), 65 Sup. Ct. 961.

In the pre-trial conference your petitioner made every effort to secure access to all the facts and documents which would clarify and make concrete the issues presented by its proposed defense. To that end it attempted to obtain certain depositions from certain officials and representatives of American Can Company and to examine the records of the corporation. In this endeavor, however, petitioner was largely frustrated. The questions concerned the prices, the discounts, and the trade practices of the American Can Company as they affected petitioner and its larger competitors. Objection was taken to all questions and officials of the corporation were instructed by counsel not to answer. The company took position that its dealings with petitioner's large competitors were "confidental" and therefore beyond judicial inquiry. A fair sample of such questions and the responses which they provoked is set forth in Appendix, pp. 34-37.

Issue was taken by the defendant with this attitude and these instructions to witnesses on the part of representatives of the American Can Company. The attorney for petitioner voiced his objections in these words:

"The attorney for defendant wishes to point out to attorneys for the plaintiff that by this instruction and by the instructions yesterday they are avoiding the entire benefits which the court desired to be obtained by this hearing; they have examined the president of Bruce's Juices, Mr. J. Adams Bruce, and went fully into all matters in connection with his transactions and his business; that they are now refusing to permit the defendant the same general type of examination.

"Further, that the issue in this case is whether or not the transactions upon which the notes in question are based as their consideration were illegal under the Robinson-Patman Act on account of discriminations; and to refuse to give us any information on the point prevents us from showing such discriminations, when such information is readily available in the office of the American Can Company here in New York and when it is not contended it is not available.

"I particularly point out, so that counsel if they see fit may change their position, as an example of that, refusing to permit the witness to answer the question and give information as to the amount of discount each of the customers, corporations, of packers' cans referred to yesterday obtained during the years in question, in other words, not permitting us to ascertain whether or not such competitors, corporations, obtained one per cent or five per cent under their quantity discount." (R. 174-175).

And, on several occasions, petitioner called the attention of the presiding judge to the fact that depositions had not been completed and that objections to questions certified to the court had not been ruled upon. It also asked for an opportunity further to examine the officials of the American Can Company after the court had ruled upon these objections. (R. 457-458).

But, while the pre-trial conference was under way, before the taking of testimony was concluded, and with motions before the court upon which there had been no rulings, the presiding judge brought the proceeding to an abrupt close. He had reached the conclusion—and ruled—that as a matter

of law the defense sought to be interposed was not allowable in a state court. As he put it:

> "As to the defense of illegality of consideration or unlawfulness of the notes under the Federal Statutes, hereinabove mentioned, I am of the opinion that under decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act. The act itself prescribes the only remedies available to persons affected by its violation and no other method of relief is to be had. The contract of sale was not under these decisions Malum in se but Malum prohibita only.
>
> "I am, therefore, of the opinion that all questions of fact and law on which the rights of the parties depend are settled in favor of the plaintiff." (R. 581-582)

Thus the sole defense upon which petitioner relied was laid to one side as irrelevant. It was thus unnecessary to consider evidence in respect to any of the pleas put forward, to rule upon any motion of defendant, or to pass upon any objection raised by American Can Company. It was thus only by ruling out the federal issues and all that related thereto that no facts were left in dispute. Petitioner acknowledged the notes to be valid and due; the court issued a "summary judgment"—for which the statutes of Florida make no provision—in favor of the plaintiff.

It is clear, therefore, that nothing in the testimony points to any admission by petitioner which deprived it of a right to the defense sought. On the contrary the evidence, incomplete as it is, reveals a prima facie case upon which petitioner is entitled to go to trial.

In respect to the federal issues raised by that prima facie case there were no findings of fact upon which the Florida Supreme Court could base a summary judgment against the petitioner.

III. Is a right established by Federal Law abridged or denied in this case by a serious departure from proper process in a State Court?

As the case has been argued, it may not be necessary for the Court to consider this question. But a word is demanded because the decision below was affirmed by the Florida Supreme Court by a divided bench, and in memorandum opinions. The result could properly have been reached, either by holding:

(1) That, as a matter of law, the defense sought to be interposed was not available in a state court; or

(2) That the undisputed facts disclosed by the pre-trial conference were not sufficient as a matter of law to constitute a defense.

One of the majority of four, seven judges sitting, held that the defense sought was not available in a state court. The other three, in a "per curiam" opinion, held that "The defense sought to be interposed was not available under the facts submitted in evidence to the court below." This, it seems clear, must be interpreted to mean that from the undisputed facts disclosed at the pre-trial conference the three judges concluded that as a matter of law the price system of American Can Company, and the trade practices attending its operation, did not violate the Robinson-Patman Act. Thus, whichever of the two be taken as the ground of judgment, a federal issue is presented.

However, if the "per curiam" opinion of the three judges is to be interpreted to mean that the Supreme Court of Florida was weighing conflicting evidence and deciding issues of disputed facts, it does abridge and deny a federal right by a serious departure from legitimate and proper process. The pre-trial conference was set up to clarify, not to resolve, issues in dispute. Furthermore, quite apart from the purpose it was intended to serve, the proceeding lacks all essentials of a fair trial of disputed issues. American Can Company refused in as many as fifty-five instances to produce documents or to permit cross-examination of

witnesses. In Appendix, pp. 34-37, are quoted typical examples which reveal the absence of the essentials of a judicial hearing with respect to a finding on any disputed issue of fact.

If, therefore, the three-judge memorandum be interpreted as deciding any disputed issue of fact, it presents a case in which petitioner has been stripped of a federal right without proper trial of the disputed issues of fact on which that right is founded.

CONCLUSION.

It follows that from any possible interpretation of the opinion of the Supreme Court of Florida, affirming the trial court without majority agreement on any single theory, your petitioner has been denied a federal right. The clarification of the limits of the federal right involved in this case is of far-reaching public and economic importance. If the defense sought is not available to independent business concerns which are victims of discriminatory trade practices, the competitive position of industry the nation over will be seriously impaired and public policy as manifest in a federal statute defeated.

CODY FOWLER,
FOWLER & WHITE,
Tampa, Florida,
R. W. SHACKLEFORD,
SHACKLEFORD, FARRIOR & SHANNON,
Tampa, Florida,
Attorneys for Petitioner.

Of Counsel:

THURMAN ARNOLD,
ARNOLD & WIPRUD,
821 15th Street, N. W.,
Washington, D. C.

APPENDIX.

Illustrations of Failure to Produce Records or Permit Examination.

"Q. Will you produce from the records of your corporation—and this is the general office of the American Can Company—a list of the cans purchased by the various canning plants of the California Packing Company that purchased packers' cans in 1937, 1938, 1939, 1940, 1941 and 1942, and showing likewise from which plant or warehouse, referred to as distributing point, of the American Can Company these cans were delivered?

A. You are referring now only to those sizes that are competitive with the sizes purchased by Bruce's Juices?

Q. No, sir, I am referring to all cans referred to as packers' cans.

Mr. Allison: To the question or request as propounded the plaintiff objects for the reason that its scope goes beyond the present or possible future issues of this cause; it is to that extent immaterial and irrelevant.

Further, that the scope of the question seeks disclosure of confidential business matters between the plaintiff and (fol. 178) other customers which are not subject to disclosure without consent of such customers." (R. 134-135)

"Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in year 1942?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision." (R. 138)

"Q. Do you know how many customers, the total amount of the purchases of the customers who did not receive discounts?

A. It is in the records, but I do not know offhand.

Q. Will you produce that figure for us?

Mr. Callahan: That question is objected to as immaterial, incompetent and improper and not within the scope of this examination or the issues involved in this suit.

The witness is instructed not to answer the question, and the propriety of the question is certified to the Circuit Court for ruling." (R. 237)

"Mr. Fowler: Gentlemen, I intend to ask this witness and likewise perhaps supplement the information which I seek to obtain from this witness by the evidence of Mr. George Madge, assistant comptroller of the American Can Company, now in this room, questions in substance as follows: to produce the invoices for the sale of cans to each of the corporations enumerated repeatedly in these proceedings for each year covered by this investigation, including the part of the year 1936; to produce the ledger sheets showing the amount of total charges made to each of these (fol. 321) customers for each separate year—and when I say each year hereafter it will be intended to mean

from June 19, 1936, to the end of that year as being included in one of those years—which ledger sheet or other record shows the total charges for cans made against each of these corporations, the amount of cash payments and the amount of discounts and allowances and credits which make up the difference between the cash payments and the total amount of such charges; and if allowances and discounts and credits other than cash are disclosed, to investigate the details thereof.

Mr. Allison: It is further informally understood that should the foregoing questions be propounded to the named witnesses, or to any officers or employees of the plaintiff, called by defendant, the plaintiff would object to such questions, except as to the following corporations, to wit: Border Packing Corporation, Engelman Products Company and Taormino Corporation, for the reason that the same are immaterial and irrelevant to the issues and possible issues in this cause, that the same are beyond the scope of the order of court, and that the same constitutes a fishing expedition into the records of the plaintiff in support of its pleas, which effort goes beyond the purview of the statute sought to be invoked thereby, and seeks to make available to the defendant for his information and benefit confidential business relations with competitor customers of the plaintiff.

And the plaintiff announces that it would and will instruct any and all witnesses to decline to answer the foregoing questions as to the five corporations, other than the three above named, and certifies the question to the Circuit Court for determination as to its propriety and admissibility." (R. 244-245)

"Mr. Callahan: In so far as an examination of Exhibits 10 to 14 is concerned the company will permit an examina-

tion of its records in so far as we are permitted to do so by customers of this corporation.

Mr. Fowler: Naturally that would be of no value to us. If it is so restricted we cannot obtain the information. In other words it is our contention that that proviso is equivalent to a declining to permit us to do so.

Mr. Callahan: In view of the position taken by counsel it is my judgment that the question be certified to the Circuit Court for determination as to its propriety, and the witness is instructed not to answer." (R. 239).